

In the Matter of )  
 )  
Biennial Regulatory Review 2000 )  
Staff Report )

## COMMENTS

On September 18, 2000, the Commission released a report summarizing an extensive review of the Commission's rules undertaken by Commission staff pursuant to Section 11 of the Communications Act of 1934, as amended, and Section 202(h) of the Telecommunications Act of 1996.<sup>1</sup>

Part IV of the Staff Report focuses on Commission's rules pertaining to common carrier, international and telecommunications regulations. It contains extensive analyses of recent and ongoing regulatory reform proceedings relating to the Commission's accounting, separations, equipment registration and universal service rules, and proposes commencement of a new proceeding on intercarrier compensation as well as a modification of the Commission's Part 64 rules relating to provision of long distance services by independent incumbent local exchange carriers.<sup>2</sup>

The Staff Report also endorses two recommendations made by NECA prior to issuance of the report. By letter dated July 26, 2000<sup>3</sup> NECA had requested that the

<sup>1</sup> Federal Communications Commission *Public Notice*, Biennial Review 2000 Staff Report Released, FCC 00-346 (rel. Sept. 19, 2000).

<sup>2</sup> Staff Report, at 14-15. The Staff Report also suggests that the Commission consider eliminating a number of common carrier rules that have become outdated. *Id.* at 16.

<sup>3</sup> Letter to Magalie Roman Salas, Secretary, Federal Communications Commission from Richard A. Askoff, NECA (July 26, 2000) (on file with Commission).

Commission eliminate the requirement in Subpart G of the rules that NECA conduct annual elections for its board of directors. NECA also recommended that the Commission eliminate the rule requiring that the Commission “approve” NECA’s average schedule formulas each year. NECA accordingly files these comments in support of the Staff’s recommendations on these two proposals.

## **Part 69 – Access Charges**

### **I. Eliminating the Requirement for Annual Elections for NECA’s Board of Directors**

Section 69.602 of the Commission’s rules sets out a number of requirements governing the NECA Board of Directors. Specifically, the rule establishes various “subsets” of NECA companies, establishes the size of the board, and specifies the representation each subset shall have.<sup>4</sup> Section 69.602 also requires that the Board include 5 “independent” directors elected to represent all member company subsets. Like the directors elected to represent individual subsets, NECA’s independent directors must stand for election each year.

NECA is a non-stock membership company incorporated under the laws of Delaware. While the Delaware General Corporation Law (DGCL) imposes an annual election requirement on stock corporations, section 215 of the DGCL specifically exempts non-stock corporations from the annual election requirement.

The annual election process imposes significant burdens on NECA, its directors, and member companies. The costs of running elections each year includes fees for independent inspectors of elections as well as the cost of printing and mailing ballots to the hundreds of entities qualified to vote in NECA elections. Incumbent directors, required to stand for election each year, must incur the time and expense of annual campaigns. Member companies are asked to participate in these elections, adding to their considerable paperwork burdens unnecessarily.

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<sup>4</sup> 47 C.F.R. § 69.602 (a) – (c).

An annual election requirement may have made sense for NECA in the initial years of the Commission's access charge plan, when the Commission's rules required mandatory common line pooling and when NECA's responsibilities included administration of the Commission's high cost and lifeline assistance funding mechanisms.

Since 1989, however, NECA's common line and traffic sensitive pools have operated on a voluntary basis, and virtually all of the larger exchange carriers, and many smaller carriers, no longer participate in NECA pooling processes. Moreover, since 1998, the Commission's new universal service mechanisms have been administered by the Universal Service Administrative Company (USAC), an independent subsidiary of NECA.<sup>5</sup>

Inasmuch as Delaware law does not impose an annual election requirement for non-stock corporations, and since NECA's responsibilities under the Commission's rules have changed considerably since section 69.602 was promulgated, it is time for the Commission to eliminate this unnecessary requirement. This will permit NECA to conduct elections at more reasonable intervals.

Sections 69.602(e), (f) and (i) of the rules should accordingly be revised as follows:

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<sup>5</sup> See Changes to the Board of Directors of the National Exchange Carrier Association, Inc. and Federal-State Joint Board on Universal Service, CC Docket Nos. 97-21 and 96-45, *Second Report and Order and Second Report on Reconsideration*, 12 FCC Rcd 18400 (1997), and Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Third Report and Order in CC Docket No. 97-21, Fourth Order on Reconsideration in CC Docket No. 97-21 and Eighth Order on Reconsideration in CC Docket No. 96-45*, 13 FCC Rcd 25058 (1998).

(e) Each subset shall select the directors who will represent it individually through ~~an annual~~ periodic elections in which each member of the subset shall be entitled to vote for the number of directors that will represent such members' subset.

(f) The association membership shall select the directors ~~for the following calendar year~~ who will represent all three subsets through ~~an annual~~ periodic elections in which each member of the association shall be entitled to one vote for each director position . . . .

\* \* \*

(i) ~~Directors shall serve for a term of one year commencing January 1 and concluding on December 31 of each year.~~

## **II. The Commission Should Adopt The Staff's Recommendations Regarding Simplification of the Average Schedule Review Process and Elimination of the Annual Election Requirement For NECA's Board Of Directors.**

### **A. Eliminating the Requirement that the Commission "Approve" NECA Average Schedule Formula Modifications.**

NECA agrees with the staff's recommendation that the Commission simplify review of NECA's average schedule formulas. This can be accomplished simply by eliminating the requirement that the Commission "approve" NECA's average schedule formula filings. Instead of conducting a separate proceeding to approve or modify the average schedule formulas, Commission review of NECA's average schedule formulas could then take place within the context of NECA's access tariff filings.

In the context of other Commission deregulatory initiatives, which have eliminated many of the "approval" requirements formerly contained in the Part 69 rules and elsewhere, the requirement that average schedule formulas be approved sticks out

like a sore thumb. As the Staff Report makes clear, significant progress has been made over the past two years in eliminating unnecessary regulation of common carriers.<sup>6</sup>

This step would not represent a new approach to regulating the average schedules, but would instead restore the methodology that was in place prior to the implementation of the Commission's access charge plan in 1984. At that time, there was no requirement that the Commission "approve" the average schedule formulas. Average schedule revenue requirements were instead simply included in AT&T interstate tariffs, which were subject to the Commission's normal tariff review and complaint processes.

When the Commission promulgated section 69.606, however, it established, for the first time, specific substantive and procedural requirements for the average schedules.<sup>7</sup> In addition to the requirement that the formulas be "approved or modified" by the Commission, section 69.606(a) requires that the formulas be designed to "simulate" the disbursements that would be received by a cost company that is representative of average schedule companies. Subsection (b) of the rule requires that NECA file annual modifications to the average schedule formulas (or to certify that no such modifications are necessary) on December 31 of each year.

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<sup>6</sup> See, e.g., Staff Report at 10-14 (reviewing accomplishments of the 1998 Biennial Review and describing proposed changes to the Commission's Part 32 accounting rules, ARMIS reporting rules, jurisdictional separations rules, and Part 68 equipment registration rules).

<sup>7</sup> MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, *Third Report and Order*, 93 F.C.C. 2d 241 (1983).

In accordance with section 69.606, NECA files average schedule “access” formulas<sup>8</sup> on the required December 31 date (or certifies that no modifications are necessary). These filings are accompanied by voluminous submissions of data and explanatory materials, and are subject to a *six-month notice period* – far longer than the notice period applicable to tariff filings under the Commission’s Part 61 rules.<sup>9</sup> This is so despite the fact that average schedule filings include fewer companies, smaller revenue requirements and less year-to-year variation in revenue requirements than tariff filings.

The following exhibit compares the current review and approval cycle for average schedule formulas with those associated with industry access tariffs:

Filing	Annual Revenue Requirement	Approximate Annual Change	Current Review Time	Approval Required?
Average Schedule Formulas	\$0.6B	\$17M	181 days	Yes
NECA Tariff	\$2.5B	\$150M	15 days	No
Industry Tariffs	\$24.5B	\$770M	15 days	No
Total Industry	<b>\$27B</b>	<b>\$920M</b>	<b>15 days</b>	<b>No</b>

The Commission’s review of average schedule filings in the past several years has included detailed analysis of data, methods by which proposed formulas have been developed, studies of related statistical estimation theory, and analyses of detailed

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<sup>8</sup> NECA’s average schedule “access” formulas include common line and various traffic sensitive element formulas, designed to simulate settlements for these elements paid to similarly-situated cost companies. Since 1997, NECA has filed average schedule universal service fund formula modifications separately on October 1 of each year, for effectiveness on January 1 of the following year.

<sup>9</sup> In the Telecommunications Act of 1996, for example, Congress saw fit to streamline the FCC’s already abbreviated tariff filing notice periods, by legislating notice periods of 7 and 15 days for rate decreases and increases, respectively. *See* 47 U.S.C. § 204(a)(3), 47 C.F.R. § 61.58. *See also* 14 FCC Rcd 12293 (1999) (1998 Biennial Regulatory Review).

settlement effects on each company. No parallel analyses are included in Commission reviews of tariff filings, which are not “approved” by the Commission but are instead, simply allowed to become effective.

This grossly disproportionate process cannot be justified on the basis of public concern over the average schedule formulas. In fact, past average schedule access filings have rarely met any substantial adverse comments or oppositions.<sup>10</sup> Moreover, the current process, though onerous, has had little effect on settlement payments. Since 1984, NECA’s access formula proposals have generally been approved as filed.<sup>11</sup>

The approval process for average schedule formulas can be viewed as redundant, in that NECA’s access tariff filings, which include revenue requirements associated with the average schedule formulas, are themselves subject to the Commission’s tariff review

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<sup>10</sup> NECA’s initial access-based average schedule formulas, filed in 1985, were opposed by a small group of local exchange carriers who were shown to have been receiving windfall settlements under the prior mechanism. NECA’s formulas were eventually approved by the Commission, and survived a subsequent challenge in the U.S. Court of Appeals. See MTS and WATS Market Structure: Average Schedule Companies, CC Docket No. 78-72 Phase I, *Memorandum Opinion and Order*, 6 FCC Rcd 6608 (1991), *aff’d*, ICORE, Inc., *et al.*, v. F.C.C., 985 F.2d 1075 (D.C. Cir. 1993). Since that time, a few parties have filed comments with respect to NECA’s filings, see, e.g., National Exchange National Exchange Carrier Association, Inc. Proposed Modifications to the Interstate Average Schedules, *Memorandum Opinion and Order*, 8 FCC Rcd 4861 (1993); National Exchange Carrier Association, Inc., Proposed Modifications to the Interstate Average Schedules, *Memorandum Opinion and Order*, 10 FCC Rcd 13252 (1995), without raising significant questions warranting rejection of NECA’s proposals.

<sup>11</sup> In a few instances, internal Commission review of NECA’s proposals have resulted in changes to those proposals. In 1997, for example, the Bureau approved NECA’s traffic sensitive formulas but prescribed a new common line formula. The overall effect of this change reduced NECA’s 1997 proposed formulas by \$6.5 million, less than 3/10ths of one percent of NECA’s overall tariff revenue requirement. NECA has also worked cooperatively (and informally) with Bureau staff to resolve staff concerns relating to central office settlements paid to high-volume companies. These changes could, however, as easily been accomplished in the context of a proceeding to review NECA’s tariff, instead of a separate average schedule “approval” proceeding.



and complaint processes.<sup>12</sup> Payments to average schedule companies, as determined by the formulas, are a component of the revenue requirement on which the tariff rates are based. In this regard, the “approval” requirement for the average schedule formulas is unique. In no other case does the Commission require annual “approval” of a portion of carrier’s tariff revenue requirement.

The logic of eliminating the separate “approval” requirement for NECA’s annual access formulas applies as well to NECA’s universal service average schedule formulas.<sup>13</sup> As noted above, NECA has in recent years filed average schedule universal service formulas separately from its annual access formula filings. Although revenue requirements associated with these universal service support formulas are not included in NECA’s access tariffs, high cost amounts are reported to the Commission in NECA’s annual USF data submissions (filed in October of each year pursuant to section 36.613 of the Commission’s rules). Both average schedule high cost fund amounts and local switching support amounts are included in the Administrator’s quarterly submissions of universal service fund revenue requirements (filed pursuant to section 54.709 of the Commission’s rules).

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<sup>12</sup> See National Exchange Carrier Association, Inc. (NECA) Proposed Modifications to the 1997 Interstate Average Schedule Formulas, *Order on Reconsideration and Order*, AAD 97-2, 13 FCC Rcd 10,116, (1997) (describing the average schedule approval process as an “intermediate step” in the tariff review process).

<sup>13</sup> NECA’s USF filings include proposed formulas for high cost fund disbursements and local switching support amounts. See, e.g., National Exchange Carrier Association, Inc. Proposed Modifications to the 1999-2000 Interstate Average Schedule Formulas, ASD 99-43, *Order*, DA 99-3021 (rel. Dec. 29, 1999).

USF high-cost disbursements to average schedule companies amount to only about \$15 million annually, representing a small portion (less than 2%) of overall high cost fund revenue requirements and a miniscule portion (less than 0.5%) of total universal service funding amounts.<sup>14</sup> While the Commission in recent years has chosen to conduct exhaustive reviews of NECA's proposed high cost funding formulas, such reviews, if necessary, could be conducted in the context of proceedings pursuant to section 54.709 of the Commission's rules, rather than in a separate average schedule approval proceeding.

NECA accordingly recommends that the Commission simplify the average schedule review process by eliminating the annual approval requirement found in section 69.606 of the Commission's rules, by consolidating review of the formulas with its review of NECA tariff filings and its review of USAC's universal service filings. This change could be accomplished by revising section 69.606 of the rules as follows:

**§ 69.606 Computation of average schedule company payments.**

(a) Payments shall be made in accordance with a formula ~~approved or modified by the Commission. Such formula shall be~~ designed to produce disbursements to an average schedule company that simulate the disbursements that would be received pursuant to § 69.607 by a company that is representative of average schedule companies.

~~(b) The association shall submit a proposed revision of the formula for each annual period subsequent to December 31, 1986, or certify that a majority of the directors of the association believe that no revisions are warranted for such period on or before December 31 of the preceding year.~~

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<sup>14</sup> Total universal service funding, distributed to eligible entities participating in the four programs managed by the Universal Service Administrative Company in 1999 amounted to over \$3.6 billion in 1999. See USAC, 1999 Annual Report to Congress and the FCC, <http://www.universalservice.org/info/99report/pg2.html>.

## Conclusion

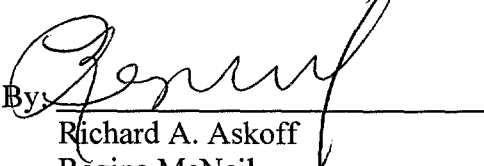
The Commission should revise section 69.602 of its rules so as to eliminate the requirement that NECA conduct annual elections for its board of directors. Substantial changes in the industry since section 69.602 was promulgated make annual elections no longer necessary to insure adequate representation of member company interests.

Eliminating this requirement will save money for ratepayers and will reduce administrative burdens on NECA, its directors, and its member companies.

Eliminating the current approval requirement for average schedule formulas would end redundant Commission reviews and place the average schedule process on an equal footing with the tariff review process, without significantly affecting the Commission's or the public's ability to review NECA's proposals. The Commission should therefore also act expeditiously to eliminate the current approval requirement for average schedule formulas as part of its Year 2000 Biennial Review.

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October 10, 2000

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I hereby certify that copy of the Comments was served this 10th day of October 2000, by electronic delivery or first class mail, to the persons listed below.

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